Supreme Court, U.S.
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90-739
No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES E. RENFRO, SR. and
JAMES E. RENFRO, JR. and
DANA HAUNER - - - - - - Petitioners

versus

KENTUCKY BOARD OF DENTISTRY and
GREG HOLMES and
WILLIAM ARNOLD - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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QUESTIONS PRESENTED

May it please the Court, under Rule 21:

The questions presented for review are:

Should the standards expressed in *Young* v. *U.S. ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 95 L. Ed. 2d 740, 107 S. Ct. 2124 (1987) be applied to states under the Due Process clauses of the 5th and 14th Amendments to the United States Constitution concerning prosecutional misconduct?

Does a state board (under Police Power) have to vote to bring charges against an individual for injunction or contempt before its attorneys can proceed in court, and after court, does it have to have authority and hold hearings to revoke a license under Due Process and Equal Protection of the 14th Amendments to the United States Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1990

JAMES E. RENFRO, SR.,
JAMES E. RENFRO, JR. and
DANA HAUNER - - - - - - - *Petitioners*

v.

KENTUCKY BOARD OF DENTISTRY and
GREG HOLMES and
WILLIAM ARNOLD - - - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

Petition for a Writ of Certiorari to the Kentucky Court of Appeals.

To the Honorable William H. Rehnquist, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James E. Renfro, Sr., James E. Renfro, Jr., and Dana Hauner, the petitioners, herein, pray for a Writ of Certiorari to review the judgment of the Kentucky Court of Appeals, returned on June 15, 1990. Discretionary review was denied by the Supreme Court of Kentucky, on October 10, 1990. The Respondents are the Kentucky Board of Dentistry, Greg Holmes and William Arnold.

OPINIONS BELOW

The denial of Discretionary Review of the Supreme Court of Kentucky was on October 10, 1990 and is attached, as Appendix A.

The opinion of the Court of Appeals of Kentucky, of June 15, 1990, is attached, as Appendix B.

The opinions of the Jefferson Circuit Court, Division 6, Honorable Jack Mudd of:

i) September 29th, 1987 and overruling a new trial, by order of November 1, 1988, concerning the issuing of an injunction.

ii) September 22, 1988, concerning contempt against Renfro, Sr.

iii) January 25, 1989, concerning dismissing a contempt against Renfro, Jr.

iv) July 17, 1989 and overruling a CR 11 motion on August 28, 1989, concerning a contempt against Renfro, Jr.

These are attached as Appendix C.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on June 15, 1990 (Appendix B) and was stayed until the Supreme Court of Kentucky issued its denial writ on October 10, 1990 (Appendix C).

Jurisdiction is conferred under Supreme Court Rule 17(B) and (C) and by 28 U.S.C.S. 1254(1).

QUESTIONS PRESENTED

Should the standards expressed in *Young* v. *ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 95 L. Ed. 2d 740, 107 S. Ct. 2124 (1987) be applied to states under the Due Process clause of the 5th and 14th Amendments to the

United States Constitution, concerning prosecutional misconduct?

Does a state board (under Police Power) have to vote to bring charges against an individual for injunction or contempt before its attorneys can proceed in court, and after court, does it have to have authority and hold hearings to revoke a license under Due Process, Equal Protection of the 14th Amendments to the United States Constitution?

STATUTES INVOLVED

The 5th and 14th Amendments on Due Process and Equal Protection clauses of the United States Constitution.

STATEMENT OF THE CASE

James Renfro, Sr. and Jr. have been petitioning the Kentucky General Assembly to change the Kentucky Dental Practice Act, to allow dental laboratories to make dentures directly for the public and call themselves denturists, as allowed in some other states and in Canada. The Dental Board and Dental Association have vigorously opposed them in lobbying efforts. The following stems from this, as retaliation. This retaliation was even after the Dental Board rejected studies by the Counsel of State Governments and the Kellogg Foundation, favoring Petitioners.

The Dental Board, with the financial help of the State Dental Association, brought an injunction action against James Renfro, Jr., a licensed Kentucky dental laboratory technician, for allegedly violating the dental practice act. After citizens, who were named in the first two verified complaints, filed affidavits that the statements in the sworn complaints were untrue, a third complaint was filed naming

James Renfro, Sr., and was brought by the Dental Board's attorney, without the Board's approval.

A trial was held and an injunction was given against James Renfro Sr., enjoining him from violating the Dental Practice Act and an injunction was given against Jr. because he held a license to the laboratory. Jr. said he was innocent and the court applied guilt by association.

A contempt action was brought against both Sr. and Jr. Jr. was dismissed, as being found innocent and Sr. was fined $500 and given a 30 day suspended sentence.

A second contempt action was brought against Jr. The witness named in the complaint swore that the prosecuting assistant Attorney General filed a false affidavit concerning her testimony and she said Jr. was innocent. The charges were dismissed, when this was found to be true at a hearing.

A third contempt action was brought against Jr. and a neighboring laboratory technician named Dana Hauner. Ms. Hauner had never had an injunction brought against her, so the charges were dismissed. The allegations were that Jr. was present in Ms. Hauner's laboratory, when she fitted an undercover detective for dentures. Jr. was found guilty by the court and given 30 days in jail and a $500 fine.

Jr. is presently out on a $2000 Appeal Bond.

Two CR 11 Motions were brought because of improprieties by the prosecutors, but dismissed on appeal.

All these cases on injunction and contempt were consolidated into one appeal case and then upheld on appeal.

REASONS FOR GRANTING WRIT

We know in petitioning this court that only a small number of petitions are accepted for review. But we ask that you please, please, consider this case.

On appeal question one, we state that *Young* v. *U.S. ex. rel. Vuitton,* 481 U.S. 787, 95 L.Ed. 2d 740, 1075 S. Ct. 2124 (1987) applied a standard to Federal cases on contempt. The Renfros ask that the same standard be applied to state actions, by use of the 5th and 14th Amendments.

There were two prosecutors in the injunction/contempt cases. The first one was by a private attorney, John Fowler, hired by the State Dental Board, but who had his salary supplemented by the State Dental Association. He was the attorney on the injunctions only. The second attorney was Greg Holmes, who was an assistant Kentucky Attorney General. Greg Holmes had a conflict of interest that prejudiced this case as:

1) He had formed, while an Assistant Kentucky Attorney General, a Kentucky for profit corporation, known as Dental Seminars, Inc., with the executive director of the Dental Board, to help supplement his income.

2) He set up, while an Assistant Kentucky Attorney General, a special assessment of Kentucky dentists to be used for his private discretion and which was approved by the Dental Board.

3) He tried to have a citizen, Carolyn Smith, commit perjury for him against Renfro, Jr. on the second contempt case and when she would not do so, the judge dismissed the case. He then filed a civil suit against her, claiming that she did not pay for a set of dentures, that were given to her, by a dentist, as a gift, to testify against Jr.

4) His corporate partner, the executive director for the Dental Board, published a demand, in the state dental magazine, that all dentists call their circuit court judges and pressure them into deciding cases for the dental board.

5) He had the Jefferson County Police conduct a search of the Renfro Laboratory, without a search warrant or authority from the Board.

6) He allowed his investigator, a non lawyer, to obtain the contempt rule by himself.

The Appellant complained about Greg Holme's actions to the Kentucky Attorney General's office in writing and in person and by CR 11 motions to the court, all to no avail.

The petitioners state that other courts have supported not applying the *Young* v. *U.S. ex rel. Vuitton, supra,* case to states, thereby granting a defendant a constitutional right if he is in a Federal court and no constitutional right if he is in a state court. See the following cases supporting this:

KY — *Commonwealth* v. *Hubbard,* Ky., 777 S.W. 2d 882 (1989) but with a strong dissent by Chief Justice Stephens and Justice Leibson

6th Cir. — 704 F. 2d 910 (1983) *Stumbo* v. *Seabold* (and cited in *Commonwealth* v. *Hubbard, supra*)

4th Cir. — *Jones* v. *Richards,* 776 F. 2d 1244 (1985)

N.C. — *State* v. *Best,* 186 S.E. 2d 272 (1972) and *State* v. *Woodruff,* 392 S.E. 2d 434 (1990)

D.N.J. — *State* v. *Kinder,* 701 F. Supp. 486 (1988)

Also

Criminal Contempt 96 ALR Fed. 519

In stating that there was a conflict of interest and upholding the Constitutional protections:

N.D. Ga. — *Hughes* v. *Bowers,* 711 F. Supp. 1574, affirmed 896 F. 2d 558 (1989)

HI—*Department of Social Services* v. *Montero,* 758 P. 2d 690 (1988)

4th Cir. — *Person* v. *Miller,* 854 F. 2d 656, 96 ALR Fed. 495 (1988)

There is also the ethical side of this issue and upholding disbarment for a similar violation:

Ky. — *KBA* v. *Lovelace,* 778 S.W. 2d 651 (1989) and cited in *Commonwealth* v. *Hubbard, supra* at 886. The lawyer was given a 45 day suspension.

Ky. — *KBA* v. *Southgate IV,* 775 S.W. 2d 921 (1989) a 30 day suspension was given.

Violation of *Code of Professional Responsibility* sections: 1-101(A)(5); 1-102(A)(6); 5-101(A); 7-102(A)(0) and (2); 9-101(B)

On Appeal Question 2, we state that the Supreme Court of Oklahoma in *Berry* v. *Board of Governors of the Registered Dentists of Oklahoma,* 611 P. 2d 628 (1980) had decided an exactly similar case, that said that no action can be taken by a dental board's attorney in court, without first being instructed by the Dental Board. The Kentucky courts failed to follow that law, or the due process and equal protection ideals of that case in relation to the Dental Practice Act in K.R.S. Chapter 313.

A citizen can be brought up on charges by indictment or by information. Both methods are by duly elected or appointed individuals. A elected or appointed judge or a party can move for contempt. In this case, the Board of Dentistry did not vote to bring an injunction against Sr., but it was brought by its attorney only. The contempt was again not brought by the Board of Dentistry nor anyone appointed by it, as the Dental Board must appoint its investigators, (see KRS 313.225). The contempt was brought by an investigator, ex parte, who the Board had never hired or approved, yet it was brought in the Board's name and a jail term imposed. Clearly an abuse of the police power of the state and delegation of that power. For

example see Justice Frankforter's decision in *Fed. CC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 184 L. Ed. 656 (1940).

The Renfros are licensed by the Dental Board as laboratory technicians, to make dentures. The Dental Board has two parts, a nine member board of dentists, a hygienist and a consumer (KRS 313.200) and a six member dental laboratory commission (KRS 313.510). In all acts, in this case, the Dental Board voted without including the six member Dental laboratory commission. Therefore presenting a similar case to *Gibson* v. *Berryhill,* 411 U.S. 564, 36 L. Ed. 2d 488, 98 S. Ct. 1689 (1973). Kentucky already approved not allowing the laboratory commission to vote in *Manning* v. *Kentucky Board of Dentistry,* 657 S.W. 2d 584 (1983).

If this case is not accepted for certiorari, the Renfros face a board who has voted to revoke their laboratory licenses, due to the contempt, without giving them a hearing and under a statute (KRS 313.520) that gives them no right to revoke or not to renew. See *Barry* v. *Barchi,* 433 U.S. 55, 61 L. Ed. 2d 365, 99 S. Ct. 2642 (1979) and annotations in 69 L. Ed. 2d 1044.

CONCLUSION

For the foregoing reasons we ask that this petition for a writ of certiorari be granted. *Taylor* v. *Hays,* 418 U.S. 488, 41 L. Ed. 2d 897, 94 S. Ct. 2697 (1974) said that a judge could not take advantage of a party in a contempt case. We ask that a prosecutor not take advantage. Maybe that is why the same Judge Hays did not approve of the opinion of the Kentucky Court of Appeals.

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Dated the 8th day of November, 1990

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A *member of the Supreme Court*

APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

90-SC-500-D
(88-CA-2444, 89-CA-228 & 89-CA-1832-MR)

JAMES E. RENFRO, JR., Et Al. - - - - *Movants*

v.

KENTUCKY BOARD OF DENTISTRY, Et Al. . - *Respondents*

Jefferson Circuit Court
84-CI-1348

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED October 10, 1990.

(s) Robert F. Stephens
Chief Justice

APPENDIX B

RENDERED: JUNE 15, 1990; 3:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No 88-CA-002444-MR

JAMES E. RENFRO, SR., and
JAMES E. RENFRO, JR. - - - - - - *Appellants*

v.

Appeal from Jefferson Circuit Court
Honorable Jack E. Mudd, Judge
Action No. 84-CI-001348

KENTUCKY BOARD OF DENTISTRY - - - *Appellee*

AND

No. 89-CA-000228-MR

JAMES E. RENFRO, SR., and
JAMES E. RENFRO, JR. - - - - - - *Appellants*

v.

Appeal from Jefferson Circuit Court
Honorable Jack E. Mudd, Judge
Action No. 84-CI-001348

KENTUCKY BOARD OF DENTISTRY
and GREG HOLMES - - - - - - - - *Appellees*

AND

No. 89-CA-001832-MR

JAMES E. RENFRO, JR., and
DANA HAUNER - - - - - - - - *Appellants*

v.

Appeal from Jefferson Circuit Court
Honorable Jack E. Mudd, Judge
Action No. 84-CI-001348

KENTUCKY BOARD OF DENTISTRY;
GREG HOLMES; and WILLIAM ARNOLD - - *Appellees*

AFFIRMING

BEFORE: CLAYTON, HAYES and LESTER, JUDGES.

CLAYTON, JUDGE. This appeal involves a number of consolidated appeals arising out of various rulings entered in the Jefferson Circuit Court. After careful review of the numerous video-tape recorded hearings, the extensive written record, and the pertinent legal authorities, we affirm in all respects.

At the heart of this matter is KRS 313 et seq., entitled Dentists and Dental Specialists. The Kentucky Board of Dentistry is charged with administering this statute. KRS 313.220(1). Part of that responsibility is to regulate the practice of dentistry and the use of dental auxiliary personnel. KRS 313.220(4). The primary purpose of this statutory scheme of restricting and regulating the practice of dentistry and its associated professions is to safeguard public health and welfare by protecting the health and life of those who need service. *Lewis* v. *Kentucky State Board of Dental Examiners*, Ky., 300 S.W. 2d 241 (1957); *Commonwealth* v. *Anderson*, Ky., 237 S.W. 2d 860 (1951). In the words used in prior opinions this is a "wholesome" and "high and most commendable public policy". *Jones* v. *Commonwealth*, 308 Ky. 233, 213 S.W. 2d 983 (1948); *Nugent* v. *Stokes*, 313 Ky. 131, 230 S.W. 609 (1960). Enacting such a series of statutory pronouncements dealing with dentistry is certainly within the legitimate exercise of the state's police power. *Martin* v. *Thompson*, Ky., 253 S.W. 2d 15 (1952).

In regulating this area of public health, the Kentucky Board of Dentistry is guided by a number of definitions as found in the statutes. Pertinent to this case are the definitions of "practicing dentistry", as found in KRS 313.010(2), and "dental laboratory" as found in KRS 313.010(4). The basis of this entire controversy is whether

James E. Renfro, Sr. (father), and James E. Renfro, Jr. (son), were involved in the unlicensed practice of dentistry through their work in a dental lab. The consolidated appeals now before this Court all arise, in one form or another, from a complaint filed by the Kentucky Board of Dentistry against father and son seeking to enjoin them from unlicensed dental practice. A review of the record and the authorities convinces us that the trial court's multiple rulings, as challenged by the appellants, were quite correct. Thus, we affirm.

As the issues are numerous and varied, the pertinent facts will be discussed in the context of the issues presented.

I.

INJUNCTION ENTERED AGAINST JR. AND SR. REGARDING THE UNLICENSED PRACTICE OF DENTISTRY

As mentioned above, the Kentucky Board of Dentistry initiated the litigation in circuit court by seeking to enjoin father and son from the unlicensed practice of dentistry. The relevant statutory pronouncement relating to the matter is KRS 313.010(2), the pertinent portions of which read as follows:

> Any person shall be regarded as "*practicing dentistry*" who, for a fee, salary or other reward paid, or to be paid either to himself, or to another person, performs or advertises to perform, dental operations of any kind . . . *or who takes impression of the human teeth or jaws to be used directly in the fabrication of any intra-oral appliance, OR shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the*

written laboratory procedure work order of a licensed dentist . . . (Emphasis added.)

It came to the attention of the Board of Dentistry that an on-going pattern of statutory violations were occurring at a specific address in southwest Jefferson County. A dental lab was located at this address. It was suspected that members of the general public were going to the lab and that the impressions for dentures were being made by the technicians and dentures being made without a work order from a licensed dentist. It true, it would amount to prohibited acts in two (2) ways: first, by the impressions being made by someone who was not a licensed dentist; and second, dentures being made by a technician without a work order from a licensed dentist. It was suspected that the Renfros were involved.

Suit was filed in 1984 by the Board of Dentistry. After a substantial lapse of time and after a great deal of procedural posturing, on April 22 and 23 of 1987, the trial court conducted an extensive evidentiary hearing concerning the request for injunctive relief. On September 29, 1987, the trial judge signed an order granting the Board the relief it requested. The order was four (4) pages in length and dealt with the matter with significant specificity. Each party appellant challenges the correctness of the trial court's ruling for various reasons, which we examine separately.

A.

James E. Renfro, Jr., maintains that the trial court committed an error by finding him guilty of violating the Dental Practice Act. It is argued that the standard of proof is that of beyond reasonable doubt and that the record does not contain sufficient evidence to satisfy that burden of proof.

We disagree with the argument for two (2) reasons.

First, an injunction is a civil matter. CR 65.01. The authority of *International Association of Firefighters* v. *Lexington*, Ky., 555 S.W. 2d 258 (1977), relied upon by the appellant to argue that the standard of proof is that of beyond reasonable doubt, simply is inapplicable to the issue presented. It is true that the case did deal with an injunction in a tangential way. However, the real issue addressed in that opinion was the proper mechanism and standard of proof to be applied in a contempt proceeding for violation of an order of injunction. It was held that if the potential penalty for the alleged violations were "serious" (generally exceeding six months in jail or a $500 fine), then the case was to be tried by a jury and a verdict of guilty returned only on proof beyond a reasonable doubt. The reasoning for this holding is due to the serious repercussions of the penalties involved. The case in no way dealt with the standard of proof required to enter an injunction in the first place.

The second reason we reject the appellant's argument is the nature of the proof contained in the record. Counsel for the Board constructed a compelling case against both father and son. It is certainly true that the case against the father was stronger since there were four (4) separate persons who testified under oath that it was the father who examined their mouths, took impressions, fitted their dentures when they picked them up, and accepted payment.

In comparison, the case against the son is not so overwhelming. Nonetheless, it is still compelling. KRS 313.-520 requires that dental labs register with the Board of Dentistry on an annual basis. The address listed on the son's registration was the address visited by the four (4) witnesses who had work done by the father. The phone number listed on the son's registration form was the same one called by one of the witnesses (Mr. Moberly) upon

whom the father did the work. In fact, the witness said that it was the son who answered the phone and made the appointment. Further, the witness said that the son was at the place of bsuiness when he (Mr. Moberly) had the work done. The witness even stated that when he asked the son about the price over the phone, the son told him, "We just don't charge like other dentists."

James E. Renfro, Jr., admitted that his lab was located on the premises. However, he denied any involvement with work done by his father, or with work done on the four (4) witnesses. The son also admitted that in the year prior to the incidents testified to that he had listed his father as a part-time employee. However, he denied that an employer/employee relationship existed when these incidents allegedly took place.

Ky. Rev. Stat. 313.010(4) defines "dental laboratory" in part as:

> . . . [I]nclud[ing] *any person*, firm or corporation other than a licensed dentist, *who directly or through an agent or employee*, by any means or method, in any way supplies or manufactures artificial substitutes for the natural teeth . . .
>
> (Emphasis added.)

Simply put, the record certainly contains evidence sufficient to allow the fact-finder to conclude that the son was involved in activity that amounted to a violation of Kentucky Dental Practice Act. Any contention to the contrary simply is without merit.

B.

It is also argued on the son's behalf that the injunction order as entered by the trial court was overly broad and vague. Accordingly, the son was not adequately informed

of the offense he committed and thus could not realistically be expected to know what conduct was improper and prohibited.

This argument is specious and totally lacking in merit for a number of reasons.

First, the trial court's four (4) page order was clearly sufficient in its detail. The problems found in the case of *Fiscal Court of Jefferson County* v. *Courier-Journal and Louisville Times Company*, Ky., 554 S.W. 2d 72 (1977), simply do not exist in this case.

Second, the son should be well aware of the limitations on dental technicians taking impressions and making dentures without written orders by a licensed dentist since there is a published landmark case dealing with these exact points in which his uncle was a party, i.e. *Manning* v. *Kentucky Board of Denistry*, Ky. App., 657 S.W. 2d 584 (1983). Dan Hauner d/b/a Dan's Dental Lab was one of the named parties against which a permanent injunction was entered in that case. The son testified hat Dana Hauner, a party eventually plead into this case, was his niece. The son also testified that Dan's Dental Lab was one of the labs also located at the address where the son conducted his business.

The only conclusion that may be reached in light of the order entered and his family's history of involvement in their chosen profession is that it is unfathomable that the son did not know or could not comprehend exactly what conduct was prohibited. Where a party either knows or should know exactly what an injunction intends to cure, the provisions of CR 65.02(1) are satisfied. *White* v. *Sullivan*, Ky. App., 667 S.W. 2d 385 (1983).

C.

The next argument made on the son's behalf in relation to this order of injunction is that it was only a general prohibition not to violate the law. The argument is that there

were no on-going violations and, thus, an injunction was improper.

If that were the case, the appellant would be correct. *McCloud* v. *City of Cadiz,* Ky. App., 548 S.W. 2d 158 (1977). An injunction is not proper where violative activities have ceased. *Id.*

However, that is simply not the case in this circumstance. The record reflects that after the order on injunction was entered, the son was brought up on contempt charges for violating the injunction; the father was brought up on contempt for the same thing, and not just once, but twice; and that a putative employee, Dana Hauner, was also charged.

Simply put, the record reflects an almost continuous course of prohibited conduct *after* the injunction was entered. It simply may not be argued with any degree of believability that the injunction was not proper on this ground.

D.

It is next argued on behalf of both father and son that some insurance forms were improperly admitted into evidence since they were copies and not originals. We dispose of this argument summarily because even if we grant solely for the sake of argument that the forms should not have been admitted into evidence, the balance of the evidence overwhelmingly indicates that the Renfros participated in prohibited conduct. Any alleged error arising therefrom is harmless.

E.

It is argued on the father's behalf that the injunction rendered as to him was improper on the basis that the Board never properly initiated proceedings against him. The minutes of the Board of Dentistry belie that statement.

The father was properly plead into the action and was given an opportunity to defend, an opportunity he used to the fullest. The injunction against him is valid.

II.

DISMISSAL OF COUNTERCLAIMS FILED BY JR. AND SR.

Father and son filed counterclaims against the Board of Dentistry and its individual members alleging selective enforcement and improper state action as a result of the Renfros exercise of first amendment rights of free speech. Various theories of recovery were plead including abuse of process, negligence, tort of outrage, and Section 1983. On March 19, 1987, the trial court entered an order dismissing the counterclaims. It is argued on appeal that the dismissal was improper.

We are precluded from reaching this issue on the merits since it has not been properly presented for appellate review.

Civil Rule 73.01(2) mandates that all appeals are to be taken to the next highest court by the filing of a Notice of Appeal. CR 73.02(1)(a) provides that the Notice of Appeal is required to be filed within thirty (30) days after the date of the judgment. CR 73.03(1) dictates that the Notice of Appeal is to designate the judgment or order appealed.

As mentioned, the trial court dismissed the counterclaims on March 19, 1987. The order only dealt with some of the issues in the case. In that circumstance, for the order to be appealable, the trial court would have to recite within the order specifically that it was final and appealable and that there was no just cause for delay. CR 54.02(1). Since the trial judge did not do that the order did not become appealable until all the other issues were resolved. That did not occur until September 19, 1987, when the order

of injunction was entered. Additional motions were made, but eventually four (4) different notices of appeal were filed. However, the order dismissing the counterclaim is not listed as an order being appealed pursuant to CR 73.03(1). The order simply was not appealed. As a result we are precluded from addressing the issue.

III.

CONTEMPT ORDER OF SEPTEMBER 22, 1988, V. JAMES E. RENFRO, SR.

The next argument made on the father's behalf is that prior to the date when he was charged with contempt the order of injunction entered against him was not appealable. This is argued to be so since a motion to reconsider had been filed and not yet ruled on by the trial court. We perceive the argument to be that the motion for rehearing had not been ruled upon, then the injunction as entered was not viable, binding, valid or enforceable. This is simply not the case.

Civil Rule 65.08(1) states that the circuit court, in its discretion, may provide that the status existing prior to the final judgment may be maintained. That relief was not requested of the trial court. In addition, CR 62.01 dealing with motions after judgment provides that unless otherwise ordered by the court, a final judgment in an action for an injunction shall not be stayed during the period after its entry and until an appeal is taken. Although a post-judgment motion was made, the appellant failed to seek this relief as well.

The simple fact is that unless a litigant seeks to have the court suspend the operation of an injunction, it is the duty of a party to obey an injunction. *Karr* v. *Kentucky State Board of Dental Examiners,* Ky., 469 S.W. 2d 545 (1971). Until relieved of the obligation to do so by an

order of Court, the father was duty bound to abide by the terms of the injunction. The action for contempt for failing to do so was quite proper.

IV.

CONTEMPT ORDER AND SENTENCING OF JAMES E. RENFRO, JR.

On July 17, 1989, the trial court conducted yet another extensive hearing in this case. On that occasion it was in regards to whether Jr. should be held in contempt for violating the injunction. The trial court so found and on August 28, 1989 rendered sentence of four (4) months in jail, all but thirty (30) days suspended, and a $500 fine. The son finds fault both with the finding of contempt and the sentence rendered. On review, we affirm in both regards.

A.

The son's contention in regards to the merits of the contempt finding is that the evidence does not reflect that he was in violation of the order of injunction. It is his argument that the wrongful acts, if any, were committed by Dana Hauner. He explains that he was present, but only at the request of Dana Hauner since she was uncomfortable and somewhat apprehensive of the person with whom she was dealing.

However, the patient/witness testified otherwise. This gentleman, William Arnold, is a detective assigned to the Special Investigations Unit of the Attorney General's office. According to him, the son instructed Hauner at each step of the process. In addition, the son not only advised Hauner on what to do, but he also examined Arnold's mouth.

This evidence is sufficient to provide an evidentiary basis for a finding that Hauner acted in concert with

James E. Renfro, Jr., as an agent or employee within the operation of a dental lab as defined in KRS 313.010(4). Hauner's actions, if true, are clearly a violation of the prohibition against the unlicensed practice of dentistry as defined in KRS 313.010(2) and KRS 313.020. The Board of Dentistry is authorized to seek an order of contempt for the violation of any injunction obtained. KRS 313.022(2).

The evidence clearly supports a finding that the son violated the injunction and, therefore, supports a finding of contempt. *Jones* v. *Commonwealth, supra; Karr* v. *Kentucky State Board of Dental Bar Examiners, supra.*

Thus, the trial court's ruling holding James E. Renfro, Jr., in contempt is affirmed.

B.

The son's next argument is that the punishment he received is disparate from that to which others have been sentenced. He was given a four (4) month sentence, all but thirty (30) days suspended, and a $500 fine. The disparate sentence was given to his father, James E. Renfro, Sr., and to his niece, Dana Hauner. His father was sentenced to thirty (30) days for contempt and a $500 fine, the jail term being suspended. His niece plead guilty to a misdemeanor in district court and was given a fine.

We affirm for reasons apparent on the video tape of the trial judge's remarks when the judge rendered sentence. That record reflects that the trial judge gave great thought to the sentence rendered. He explained that the actions which led to his ruling of contempt were the most flagrant that he had seen in his seventeen (17) years on the bench. He explained that he had tried to give every appellant involved another chance to comply with the court's orders when he had the father before him on contempt charges for violating the injunction shortly after the injunction order had been entered and that since then father, son,

and the niece Dana Hauner had all committed other violative acts. The trial judge expressed his frustration at being unable to communicate to the appellants the seriousness of their actions in failing to abide by the court's directions.

In light of all of these factors, the trial judge exercised a great deal of admirable restraint in the sentence he rendered. Not only does the court have the inherent power to punish for contempt, but the statutes in this case give him the specific authority to do so. *Karr* v. *Kentucky Board of Dental Examiners, supra;* KRS 313.022(2).

The sentence of James E. Renfro, Jr., for contempt as entered by the Jefferson Circuit Court is affirmed.

V.

REFUSAL TO GRANT CIVIL RULE 11 SANCTIONS V. ASSISTANT ATTORNEY GENERAL AND THE INVESTIGATOR

We summarily affirm the trial court's denial of Civil Rule 11 sanctions. These issues were not listed on the appellants' prehearing conference statement as required by CR 76.14(3). Thus, we are not required to address them. Even if we choose to address the issues, they have no merit.

The investigator proceeded in a correct fashion by initiating contempt proceedings by filing an affidavit. KRS 313.022(2). There is no requirement that the affidavit be sworn to by an attorney as the appellant seems to claim.

Further, the Assistant Attorney General proceeded correctly in filing contempt charges against Dana Hauner although she was not named specifically in the order of injunction. CR 65.02(2) provides that an injunction shall be binding upon the parties to the action, their officers, agents, and attorneys, *and upon other persons in active concert or participation with them who receive actual notice*

of the injunction *by personal service otherwise.* Had the trial court chosen not to dismiss the contempt action against Dana Hauner and had actually held her in contempt, by the state of the record we would have affirmed that finding since she very reasonably could have been found to have had notice of the injunction. *White* v. *Sullivan,* Ky. App., 667 S.W. 2d 385 (1984). In addition, we find the Assistant Attorney dealt in good faith with these parties as indicated in the evidentiary hearing conducted against the son. The contempt action against Hauner had already been dismissed, and the son's counsel called her as a witness. Before she started to testify, the Assistant Attorney General informed the son's counsel and the court that in all likelihood charges were going to be fined against Hauner independent of the contempt proceedings. By doing so, the assistant attorney general made it possible for her to elect to exercise her right not to incriminate herself. His conduct is an example of the sense of justice and fair dealings which should be reflected in our Commonwealth's prosecutorial staffs.

As a result, the trial court's ruling denying Civil Rule 11 relief is affirmed.

We affirm the rulings of the Jefferson Circuit Court.

CLAYTON, J., and LESTER, J., CONCURRING.

HAYES, J., CONCURS IN RESULT ONLY.

Attorneys For Appellants:

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Louisville, Kentucky

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APPENDIX C-i

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 84-CI-01348

KENTUCKY BOARD OF DENTISTRY - - - *Plaintiff*

v.

JAMES RENFRO, SR., Et Al. - - - - *Defendants*

OPINION AND ORDER—Entered September 29, 1987

This is an action by which plaintiff, Kentucky Board of Dentistry, seeks an injunction against defendants, James E. Renfro, Sr. and James E. Renfro, Jr., father and son, for engaging in the illegal practice of dentistry, in violation of KRS 313.010(2).

Defendant, James E. Renfro, Sr., is charged with and evidence established that he took impressions of the human teeth and jaws of two of the witnesses, Morris and Kirby, and that this information was forwarded to James E. Renfro, Jr., who filled out the necessary insurance application forms for reimbursement for the dentures that were sold and delivered at his studio, being the studio of James E. Renfro, Jr.

These defendants are registered laboratory technicians which lab is registered in the name of James Renfro, Jr. under L-24, in which registration James Renfro, Sr. is idenitfied as a part-time employee over the years of the registration, including those years in which the violations involved herein are charged.

As registered technicians, they may perform the work complained of, if done so under written authorization of a qualified licensed dentist. There is no evidence or claim made that these defendants at any time had written authorization of a licensed dentist to do the work complained of herein.

The patients involved are Perry Mobley, M. Morris, Eugene Wolfe and a Mrs. Kirby. They all testified that they went to Renfro because of hearing they were reasonable and because of references and recommendation of a friend. They were not in any instance referred by any licensed dentist. Their testimony was that they went to the office laboratory, had an impression taken and then went back and had the teeth fitted and later had adjustments made.

The testimony of plaintiff's witnesses established that the actual dental work or the facts upon which the state bases its violations of the statute were performed by James Renfro, Sr. and, in two instances, witnesses for the state, Mobley and Wolfe, identified both Sr. and Jr., stating that Jr. was present on the occasion they had impressions made but gave no testimony that Jr. performed any dental services. The dental services referred to were the taking of impressions and the fitting of teeth wherein James, Sr. put his hands or fingers in the mouth of the patient. In doing so, such constitutes a violation of the statute in the unlawful practice of dentistry by a licensed laboratory technician, where there is no written authorization from a licensed dentist.

The court finds, based on the evidence of the witnesses who testified, that unquestionably and undeniably, James Renfro, Sr. did take impressions and perform laboratory work in the structure and making of dentures, all in violation of the Kentucky Dental Statute and beyond the scope of his authority as a licensed technician. Unquestionably,

the laboratory where the work was performed was owned and operated as registered in the name of James Renfro, Jr. James Renfro, Jr. take the position that he knows nothing about this work done and that it was not done with his permission or authority. The defendant's counsel takes the position that there is a lack of proof tying any agency relationship or tying James Renfro, Jr. into any responsibility for the acts of James Renfro, Sr. However, the evidence shows the address where the patients had the work done is the same address as the dental lab as registered by James Renfro, Jr. and that it was registered each year, in 1977, 1978, and each year thereafter, and in the years in which the work involved was done for the witnesses who testified, showing in the registration that the father was a part-time employee of the laboratory. Also, two of the witnesses, Kirby and Morris, who testified of work being done by James Renfro, Sr., stated that James, Jr. signed an insurance claim for them with the Arco Insurance Company, making claim for payment of the money for dentures that were made by his father, James, Sr.

Evidence established by testimony of witnesses that on two occasions James, Jr. was identified as being present, that is was his lab, that he signed the insurance application form to collect for work done by James, Sr., all of which appears to establish that James, Jr. participated in and knew about the illegal dental practice performed by his father at the laboratory owned by him, by taking impressions and fitting the dentures.

An issue is raised by defense counsel that the minutes of the Board may not be sufficient to authorize the action taken by the Board in that it failed to establish through its minutes that such action be taken. The record shows that the original complaint was taken against James, Jr. and later, based on an affidavit received from Mrs. Kirby, the Board expanded its investigation and action against James,

Sr. and filed an amended complaint setting up the grounds for an injunction against both. The court finds no basis for defendant's argument on this count.

The court finds that James, Sr. did, in fact, take impressions of the teeth and jaws of the witnesses who testified herein and fabricated a set of dentures for each of them, for which a fee was charged and that all was done without a work order from a licensed dentist, in violation of KRS 313.010(2).

The court further finds that James, Jr., as an employer of Sr., knowingly participated with his father in the aforesaid prohibited acts and joined in selling and delivering dentures to M. Morris and Hazel Kirby, and filled out insurance forms to seek reimbursement of fees charged for the denture work performed by his father as an employee, all in violation of KRS 313.010(2).

Pursuant to these findings, the following injunction is entered.

PERMANENT INJUNCTION

The court having heard evidence of the parties and arguments of counsel and being sufficiently advised. IT IS ORDERED:

1. The aforesaid findings and conclusions be and they are incorporated into and made a part hereof.

2. James E. Renfro, Sr. and James E. Renfro, Jr., individually and jointly, *or* individually, as owner, operator or employee of a dental technician laboratory, are permanently enjoined from violating KRS 313.010(2) in any manner, by performing dental operations of any kind or from diagnosing or treating diseases or lesions of the human teeth or jaws, or from taking impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance, or from constructing, supplying,

reproducing or repairing any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written laboratory procedure work order of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist.

(s) Jack E. Mudd
Jack E. Mudd
Date: 9 - 29 - 87

cc:

John T. Fowler, III
Attorney for Plaintiff

Franklin S. Yudkin
Attorney for Defendants

Sheldon Gardner
Attorney for Defendants

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 84-CI-01348

KENTUCKY BOARD OF DENTISTRY - - - *Plaintiff*

v.

JAMES RENFRO, SR., Et Al. - - - - *Defendants*

ORDER—Entered November 1, 1988

Although motion was made by defendant for a new trial, an order was entered on October 12, 1987, by which plaintiff was granted ten days to respond. Thereafter, no action was taken by either party to submit the motion to the court for its decision until plaintiff's contempt motion on September 15, 1988.

The court, having reviewed arguments, overrules defendant's motion for new trial and denies stay of injunction as sought. This is a final and appealable order and there is no just reason for delay in its entry.

(s) Jack E. Mudd
Judge Jack E. Mudd
Date: 11-1-88

cc:

Greg Holmes
Assistant Attorney General
Counsel for Plaintiff

John T. Fowler, III
Counsel for Plaintiff

Franklin S. Yudkin
Attorney for Defendant

APPENDIX C-ii

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 84-CI-01348

KENTUCKY BOARD OF DENTISTRY - - - *Plaintiff*

v.

JAMES E. RENFRO, SR., and
JAMES E. RENFRO, JR. - - - - - *Defendants*

ORDER—Entered September 22, 1988

The court having scheduled a show cause hearing pursuant to an affidavit filed by the plaintiff, having heard the testimony of Kirjath Toney and James Renfro, Sr., and having considered the arguments of the parties, does now find that defendant, James Renfro, Sr., has violated the permanent injunction entered by this Court on September 29, 1987 and is therefore guilty of contempt, and as punishment for said contempt it is hereby ordered and adjudged as follows:

1. Defendant James Renfro, Sr. is sentenced to thirty (30) days in jail, said sentence to be suspended on condition that said defendant complies fully with the permanent injunction in this case. Should James Renfro, Sr. again violate this Court's injunction, the thirty (30) day sentence shall be immediately reinstated and James Renfro, Sr. shall serve any additional jail time which the Court may deem appropriate.

2. It is further ordered that defendant James Renfro, Sr. shall pay a fine of $500, said fine to be paid immediately upon the conclusion of any appeal taken by the defendants

herein or immediately upon the expiration of the time permited for appeal if no appeal is filed. Defendant James Renfro, Sr., shall be relieved of the obligation to pay said fine only upon reversal of this Court's order by an appellate court.

(s) Jack E. Mudd
Judge, Jefferson Circuit Court

APPENDIX C-iii

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 84-CI-01348

KENTUCKY BOARD OF DENTISTRY - - - *Plaintiff*

v.

JAMES RENFRO, JR., Et Al. - - - - *Defendants*

ORDER—Entered January 25, 1989

This matter came before this court for hearing on summons-warrant issued against defendant December 20, 1988, for violation of an injunction, pursuant to KRS 313.022.

The summons was sought and issued based on affidavit of a Carolyn Smith, establishing denture practice of defendants in violation of this court's injunction.

At time of trial held before this court on January 13, 1989, the within affiant recanted her affidavit. Accordingly, plaintiff's action was dismissed; whereupon, defendant sought action under Rule 11 against plaintiff's counsel. The court denied such motion and hearing thereon, finding action of defendant's counsel to invoke sanctions of Rule 11 inappropriate and misplaced.

(s) Jack E. Mudd
Judge Jack E. Mudd
Date: 1 - 25 - 89

cc:

Greg Holmes
Assistant Attorney General
Counsel for Plaintiff

Franklin S. Yudkin
Attorney for Defendant

APPENDIX C-iv

JEFFERSON CIRCUIT COURT

No. 84-CI-01348

KENTUCKY BOARD OF DENTISTRY - - - *Plaintiff*

v.

JAMES RENFRO, SR., Et Al. - - - - *Defendants*

OPINION AND ORDER—Entered July 18, 1989

This action is now submitted for the court's decision on briefs filed by counsel pursuant to a hearing held on defendant's alleged violation of an injunction from this court.

Pursuant to a trial held, this court, on September 29, 1987, permanently enjoined James E. Renfro, Sr. and James E. Renfro, Jr., from engaging in dental work as defined in the statute and contained in the injunction.

This opinion and ruling relates to a hearing held before this court on May 4, 1989, involving contempt charges against James Renfro, Jr., under KRS 313.020, based on violation of the above injunction.

At a prior hearing before this court on September 22, 1988, James Renfro, Sr. was found in violation of the injunction, found in contempt and given a 30-day suspended sentence and a $500. fine pursuant to written order entered. Motion for a new trial was overruled.

On January 13, 1989, a hearing was held on alleged violations of both defendants, based on an affidavit of plainsiff's witness. The court dismissed the charges for the reason that the witness for the Board recanted her affidavit at trial. The court also dismissed Rule 11 action sought

by defendant's counsel against plaintiff's counsel, per written order entered January 25, 1989.

As in the prior actions, the present action before this court was initiated under KRS 313.022(2). As previously, a summons warrant was issued in lieu of an arrest order called for by the statute. A hearing was set thereon and defendants responded and appeared at the hearing. The court considered this more appropriate, rather than place defendant under arrest prior to a hearing.

Trial was held on May 4, 1989, and leave was granted for counsel to file briefs, which have been filed.

William Arnold, in addition to filing an affidavit in support of plaintiff's action, testified before the court. His testimony showed that on visiting the premises of defendants at their address at 6405 Greenwood Road on January 27, 1989, he met both Dana Hauner and James Renfro, Jr. and arranged for fitting and the purchase of dentures.

Although defendant vehemently denied any violation, the evidence was clear that James Renfro, Jr. was there, knew of, acquiesced in, supported and participated with Dana Hauner in performing services in making dentures and taking impressions, in clear and willful violation of the statute and the permanent injunction of this court.

He denied participating with her in the making of and sale of the dentures, claiming he was there, as he says, at the request of Ms. Hauner, because she did not know Arnold, implying she was fearful of him. However, it was not necessary he be in the office where the service was performed, but could have remained nearby and still provide the security of his presence. It was not necessary to examine Arnold's mouth, as was testified to, or supervise Dana Hauner in taking the denture impression and give her directions.

Actually, there was no testimony of any incident that would put Dana Hauner in fear as would require the close presence of James Renfro, Jr.

James Renfro, Sr. stated in his testimony that it would be foolish for his son or him to assist Dana Hauner in doing something illegal by taking impressions. By this Court, it can also be stated it was foolish for Renfro, Sr. or Jr., to openly permit, in their laboratory, the making of dentures by Dana Hauner under their supervision and participation, in clear violation of the statute. The entire operation on their part is an open and flagrant act in face of the existing injunction of this court.

The court finds James Renfro, Jr.'s explanation to be solely an alibi in answer to charges against him. Based on the testimony of Mr. Arnold and his affidavit filed herein, James Renfro, Jr. is found to not only be involved in the acts of Dana Hauner, but to have assisted her in obtaining denture impressions for Mr. Arnold, for which he paid $150.00.

Based on these findings, the court finds James Renfro, Jr. to have willfully and flagrantly violated the injunction and is in contempt of this court.

This matter is set to August 22, 1989 at 3:30 P.M., for the purpose of fixing punishment.

(s) Jack E. Mudd
Judge Jack E. Mudd
Date: 7 - 17 - 89

cc:

Greg Holmes
Attorney for Plaintiff

Franklin S. Yudkin
Attorney for Defendant

JEFFERSON CIRCUIT COURT

DIVISION SIX

No. 84-CI 01348

KENTUCKY BOARD OF DENTISTRY - - - *Plaintiff*

v.

JAMES RENFRO, SR., Et Al. - - - - *Defendants*

ORDER FIXING PUNISHMENT FOR CONTEMPT

This matter having come on for hearing for the purpose of fixing punishment for defendant James Renfro, Jr. for contempt for his violation of the permanent injunction entered by this Court against James Renfro, Jr., *et al.* in the above-styled action on September 29, 1987 and the Court having heard arguments of counsel for plaintiff and defendant and having heard a statement made by James Renfro, Jr., and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED as follows:

1. Defendant James Renfro, Jr. shall serve four (4) months' jail time under the supervision of the Jefferson County Department of Corrections, and defendant James Renfro, Jr. shall also pay a fine of Five Hundred Dollars ($500);

2. All of the foregoing sentence is hereby suspended except for thirty (30) days' jail time and the Five Hundred Dollar ($500) fine, said suspension being expressly conditioned on defendant James Renfro, Jr.'s good behavior; and

3. Defendant James Renfro, Jr. may post a bond for purposes of appeal in an amount of One Thousand Five Hundred Dollars ($1,500) cash, which bond shall be posted not later than 1:30 p.m. on August 29, 1989.

Entered 8/28/89.

(s) Jack E. Mudd
Judge, Jefferson Circuit Court

APPENDIX C-vi

JEFFERSON CIRCUIT COURT

DIVISION SIX

No. 84-CI-01348

KENTUCKY BOARD OF DENTISTRY - - - *Plaintiff*

v.

JAMES E. RENFRO, SR., et al. - - - *Defendants*

ORDER DISMISSING CR 11 MOTION

Plaintiff having moved the Court to dismiss the defendant's second CR 11 motion filed May 15, 1989, the Court finding that attorney Greg Holmes acted reasonably under the circumstances of this case and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that plaintiff's motion to dismiss defendant's CR 11 motion be and the same is hereby granted.

Entered 8-28-89.

(s) Jack E. Mudd
Judge, Jefferson Circuit Court